

The First-to-File Provision in H.R. 1249 is Unconstitutional: A Textual and Historical Analysis

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I. The First-to-File Provision in the America Invents Act (S. 23 and H.R. 1249)

The America Invents Act of 2011 will radically overhaul the American patent system. Already passed by the Senate on March 8 in vote of 95-5 and recently voted out of committee in the House and awaiting a floor vote, this “patent reform” legislation will substantially change the American patent system in both substance and procedure.¹ One of its most important substantive changes will be the elimination of the uniquely American approach in securing property rights in inventions to only their first and true inventors (the “first-to-invent” system). Section 2 in the Senate (S.23) and the House (H.R. 1249) versions of the America Invents Act will replace the first-to-invent system with the one long enforced in England and in other countries: the first person to file for a patent receives the property right (the “first-to-file” system).

As many patent law experts have observed, the shift from a first-to-invent to a first-to-file system rewrites “core patent law fundamentals” in this country.² This is not hyperbole. The first-to-file provision in both S. 23 and H.R. 1249 substantially revises the Patent Act; for instance, it delete or rewrites innumerable references to priority of inventorship in the existing statutory sections concerning novelty (35 U.S.C. § 102) and obviousness (35 U.S.C. § 103). It also eliminates an entire subsection in the Patent Act that sets forth the substantive and procedural requirements for ensuring that only the first inventor receives a patent (35 U.S.C. §102(g)).

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¹ See S. 23, 112th Congress (2011), available at <http://pub.bna.com/ptcj/S23aspassedMar8.pdf> ; H.R. 1249, 112th Congress (2011), available at <http://pub.bna.com/ptcj/HRonPRMay30.pdf>.

² See Dennis Crouch, *America Invents Act—First to Invent and a Filing Date Focus*, Patently O Blog, Mar. 10, 2011, available at <http://www.patentlyo.com/patent/2011/03/america-invents-act-first-to-invent-and-a-filing-date-focus.html>.

In sum, the America Invents Act provides that the first inventor no longer has the rightful claim to the property right in an invention—the patent. To the contrary, any person or commercial firm who is first to file a patent application will now receive the patent, regardless of whether this person or firm was the actual first inventor of the technology. Section 2 does create a minor exception to this rule: the first filer must not have “derived” its patented invention from another inventor who later filed for a patent, and it creates a new legal and administrative framework for enforcing this new prohibition.³ Perhaps as a result of this sanction on granting patents for “derived” inventions, Section 2 of the America Invents Act titles this radical reform as a “first-*inventor*-to-file” system, as opposed to the traditional nomenclature of a “first-to-file” system. This unusual wording in § 2’s title invites only confusion: the America Invents Act creates a conventional first-to-file system, pure and simple.

The unusual title for the first-to-file provision in the America Invents Act is revealing. Although first-to-file is the dominant approach in patent systems around the world, no other country refers to it as a “first-inventor-to-file” system.⁴ Why would Congress sow unnecessary confusion and not follow the practice of the rest of the world in simply calling this a “first-to-file” system? This question is particularly pressing given that the primary justification for this change in the patent system is that the United States must *conform* with the patent systems in operation in Europe and around the world (following its obligations under various treaties

³ See S. 23, § 2, at 11-18; H.R. 1249, § 2, at 11-18. The Senate and House bills are identical in revising §§ 291, 135, 134, and 146 of the Patent Act, setting forth the new prohibition on “derived patents” and detailing the procedural mechanisms for how this prohibition will be applied in administrative proceedings at the PTO. As observed by many commentators, this belies the claim of the supporters of patent reform that it is eliminating costly and complex disputes as to who is a first inventor under § 102(g). The proposed legislation merely replaces these “priority” disputes with new costly and complex “derivation” disputes. Copyright lawyers understand this point very well, as proving that someone derived his work from another is a doctrinally nettlesome issue in copyright law.

⁴ For instance, Canada shifted from an American-style first-to-invent to a first-to-file system as recently as 1989, and it was and is referred to as merely a “first-to-file system.” See Robin Coster, *From First-to-Invent to First-to-File: The Canadian Experience* (April 2002), available at <http://www.torlys.com/Publications/Documents/Publication%20PDFs/ARTech-19T.pdf>.

concerning intellectual property rights). Why would Congress adopt this unusual title for a provision that is supposed to harmonize America’s patent system with foreign patent systems in both name and substance?

The answer is simple: the drafters of § 2 of the America Invents Act know that there is a constitutional problem with this radical change to the American patent system, and they are engaging in linguistic legerdemain to obscure this substantive defect in the legislation. In shifting from a first-to-invent to a first-to-file system, the America Invents Act contradicts both the text and the historical understanding of the Copyright and Patent Clause in the Constitution.

As patent lawyers well know, Congress does not have unfettered discretion in enacting patent legislation. Its authority to do so is granted to it directly by the Constitution in Article I, Section 8, Clause 8, which provides that Congress can “secure” to “Inventors the exclusive Right to their . . . Discoveries” in order to “Promote the Progress of . . . useful Arts.” In assessing a first-to-file system, the operative term here is “Inventors.” The Constitution limits Congress’s power to grant patents to anyone but inventors, which by definition and longstanding historical practice means *first inventors*. Accordingly, the patents statutes have always secured to American inventors, barring a procedural or substantive default on their part, the right to obtain a patent—the property right in an invention. Jonathan Massey does an excellent job in explaining how the first-to-file provision in the America Invents Act is unconstitutional on textualist grounds,⁵ and thus this paper summarizes the case law, commentaries and other primary historical sources from the early American Republic that support this textualist argument.⁶

⁵ See Jonathan S. Massey, *H.R. 1249 Would Violate the Constitution, Hurt Innovation, and Cost American Jobs*, at 2-4.

⁶ For purposes of brevity, this paper will not directly cite to much of the substantial primary historical sources that support its historical arguments, but these primary sources are easily found in citations that follow.

II. A First-to-File Patent System is Unconstitutional

Supreme Court Justices and commentators often repeat the cant that the modern patent system was born of the English Crown's grants of commercial monopoly privileges in the late sixteenth and early seventeenth centuries.⁷ It is true that the provenance of American patent law is found in Royal grants creating manufacturing monopolies—dispensed through the legal device of a *letter patent*, which is the etymological basis for calling them *patents* today.⁸ But an American patent was radically different from these earlier commercial monopolies created by the English Crown. Following the Constitutional Convention of 1787 and the enactment of the Patent Act of 1790 by the First Congress, American patents neither created commercial monopolies nor protected importers of technology known elsewhere in the world—American patents secured a property right to the *first inventor* of novel technology.

Although both English and American patents were different in the late eighteenth century than their ancestors of Royal privilege in the English feudal system, it is unsurprising that Revolutionary Americans broke even more radically with English tradition. From its very beginnings, the American patent system was part of the unique approach to politics and law known as “American exceptionalism.” The emphasis in both the Constitution and in all subsequent patent statutes on securing *property rights* to *first inventors*—as opposed to personal privileges secured to first filers or first importers—has been an essential part of American exceptionalism. This point is too often lost among the rote recitations that the historical antecedents of the American patent system are found in Royal grants of privilege in England in the sixteenth and seventeenth centuries.

⁷ See, e.g., *Graham v. John Deere Co.*, 383 U.S. 1, 5-6 (1966) (“[The Copyright and Patent Clause] was written against the backdrop of the practices—eventually curtailed by the Statute of Monopolies—of the Crown in monopolies to court favorites in goods or businesses which had long before been enjoyed by the public.”).

⁸ See Adam Mossoff, *Rethinking the Development of Patents: An Intellectual History, 1550–1800*, 52 HASTINGS L.J. 1255, 1259-76 (2001).

A. The Text and Original Understanding of the Constitution Mandate that Only First Inventors Receive Patents

Although there are almost no direct statements by the Framers or by state constitutional delegates concerning the public meaning of the Copyright and Patent Clause,⁹ the American approach in securing to the first inventor a justly earned property right point was well understood at the time and in the ensuing years in which the patent system developed and grew.¹⁰ In his influential edition of Blackstone's *Commentaries*, for instance, St. George Tucker summarily rejected criticisms of the Constitution that the Copyright and Patent Clause permitted the federal government "to establish trading companies."¹¹ St. George Tucker concluded that "nothing could be more fallacious" because "such monopolies" were "incompatible" with a constitutional provision that secured only an "exclusive right" for "authors and inventors."¹² In other words, the Constitution authorized Congress only to secure *property rights to first inventors*, not commercial monopoly privileges obtained by supplicants of the federal government's favor.

A couple decades later, in his equally influential *American Commentaries*, Chancellor James Kent classified both copyrights and patents under the heading, "Of original acquisition by intellectual labor."¹³ The emphasis here on *original labor* was essential to Chancellor Kent's justification of the American copyright and patent laws, which directly connected the moral justification of patents to the same moral justification for land and other property rights—the American viewpoint that each person has a natural right to the fruits of one's labors. Thus,

⁹ See Adam Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent "Privilege" in Historical Context*, 92 Cornell L. Rev. 953, 977 (2007).

¹⁰ *Id.*, at 977-85.

¹¹ 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA 266 (1803) (appendix to vol. 1).

¹² *Id.*

¹³ 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 497 (O.W. Holmes, Jr. ed., 12th ed. 1873) (1826). American judges relied on Kent's *Commentaries* in adjudicating patent disputes. See, e.g., *Hotchkiss v. Greenwood*, 52 U.S. (11 How.) 248, 269 (1850) (Woodbury, J., dissenting) (quoting from Kent's *Commentaries* in leading nineteenth-century Court decision applying what is now known as the nonobviousness doctrine in 35 U.S.C. § 103).

Chancellor Kent announced the unremarkable proposition of his day that “[i]t is just that [authors and inventors] should enjoy the pecuniary profits resulting from mental as well as bodily labor.”¹⁴ This emphasis on the moral claim of the first inventor to the fruits of his labors was a unique American justification for patents under the Constitution.

Throughout the nineteenth century, American courts easily identified the many differences between the American and English patent systems, as evidenced in the Constitution, in legal doctrine and in policy. Among these many differences, of course, England had a first-to-file patent system, which was well known to Americans.¹⁵ In 1878 in *McKeever v. United States*, for instance, the Court of Claims surveyed the unique American patent system vis-à-vis the English patent system.¹⁶ The *McKeever* court recognized that, even by the late nineteenth century, England remained wedded to its traditional view of patents as “a grant” issuing solely from “royal favor,” and therefore it “shall not exclude a use[] by the Crown,”¹⁷ a legal and policy view supported in English patent jurisprudence by its requirement that the first filer and not the first inventor receives a patent. The *McKeever* court markedly pointed out that this was not the legal status of patents in the now-independent United States of America, which secured the “property in the mind-work of the inventor.”¹⁸ The *McKeever* court did not focus specifically on the issue of first-to-invent versus first-to-file, but it was implicit in its textual and doctrinal

¹⁴ 2 KENT, *supra* note 13, at 497.

¹⁵ In a widely publicized legal fight, Charles Goodyear lost his right to patent in England his groundbreaking discovery of vulcanized rubber because he lost the race to file a patent application in the English patent office. Luckily, Goodyear was able to patent his discovery in the United States because he was in fact the first inventor of this monumental discovery. See Charles Slack, *Noble Obsession: Charles Goodyear, Thomas Hancock, and the Race to Unlock the Greatest Industrial Secret of the Nineteenth Century* 134-38, 156-61 (Hyperion, 2002).

¹⁶ *McKeever v. United States*, 14 Ct. Cl. 396, 420 (1878). The specific legal issue in dispute in *McKeever* was whether patents were secured as “private property” under the Takings Clause of the Fifth Amendment, to which the court answered in the affirmative. There is no extant record of an appeal to the Supreme Court, but in *Russell v. United States*, 182 U.S. 516, 531 (1901), the Court refers to *McKeever* as having been “affirmed on appeal by this court.”

¹⁷ *McKeever*, 14 Ct. Cl. at 420.

¹⁸ *Id.* at 417-18.

analysis of how the U.S. uniquely secured the “property in the mind-work of the inventor” under the Constitution—the patent went to the first inventor who first created this property.

In its comparison between English and American patents, the *McKeever* court first analyzed the text of the Copyright and Patent Clause as evidence of the fundamental distinction between the English Crown’s *personal* privilege and the American *property* right. The court explained that the language in this constitutional provision—the use of the terms “right” and “exclusive,” the absence of the term “patent,” and the absence of any express reservation in favor of the government—established that the property rights secured to first inventors in an American patent were not on the same legal footing as the personal privileges secured by the English Crown.¹⁹ The court further noted that the Framers empowered Congress, not the Executive, to secure an inventor’s rights—placing this constitutional provision in Article I, not in Article II—which meant that the Framers viewed patents as property rights secured by the people’s representatives, not as a special grant issued by the prerogative of the Executive.²⁰ The Framers did not expressly state in the 1787 Constitutional Convention their reasons for granting Congress the power to secure patents,²¹ but the *McKeever* court easily concluded that “they had a clear apprehension of the English law, on the one hand, and a just conception, on the other, of what one of the commentators on the Constitution has termed ‘a natural right to the fruits of mental labor.’”²²

Invoking this classic formulation of the natural right to property,²³ the *McKeever* court then canvassed the federal government’s interpretation of the Copyright and Patent Clause in the

¹⁹ *Id.* at 421.

²⁰ *Id.* at 420.

²¹ See Mossoff, *supra* note 9, at 977-78.

²² *Id.*

²³ See, e.g., *Vanhorne’s Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (1795) (Patterson, J.) (“[T]he right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of

century since the Founding Era, finding again that patents protected fundamental property rights, not special grants of personal privileges. Accordingly, Congress’s enactment of the patent statutes, the Executive’s use of patented articles only through “express contracts,” and the Judiciary’s favorable interpretation of these statutes and contracts all “forbid the assumption that this government has ever sought to appropriate the property of the inventor.”²⁴ The *McKeever* court thus held that patents were secured as “private property” under the Takings Clause of the Fifth Amendment along with land and other types of property, a position that made sense given that patents had long been justified in Congress and in many court decisions as property rights rightly securing the fruits of the labors of first inventors.

B. The First-to-Invent Rule was Part of the Unique American Approach to Securing Patents as Property Rights

Today, people do not realize how radical the American approach was to securing property rights in patents throughout the late eighteenth and nineteenth centuries. Securing patents as fundamental property rights to first inventors was unheard of in other countries, such as in England, which viewed patents as special personal privileges doled out by the government in pursuit of its regulatory and economic policy objectives.²⁵ This is why these other countries adopted first-to-file rules and implemented patent systems that were more akin to modern regulatory agencies in their discretionary authority. This stood in stark contrast to the unique

man. . . . No man would become a member of a community, in which he could not enjoy the fruits of his honest labour and industry.”)

²⁴ *McKeever*, 14 Ct. Cl. at 421; see also Mossoff, *Reevaluating the Patent “Privilege,”* *supra* note 9, at 992-98 (detailing how antebellum and mid-nineteenth-century courts treated patents as property rights both procedurally and substantively)

²⁵ See B. Zorina Khan, *The Democractization of Invention: Patents and Copyrights in American Economic Development, 1790-1920* (Cambridge University Press, 2005) (comparing historical U.S. patent system to England, France and Germany); William Rosen, *The Most Powerful Idea in the World: A Story of Steam, Industry, and Invention* 267–69 (Random House, 2010) (discussing France’s disapproval of securing patents as property rights and how thus undermined its industrial development).

American patent system, which secured property rights to first inventors through a set of legal institutions and doctrines built around the rule of law.²⁶

For these reasons, it was common for congressmen and courts in the nineteenth century to draw doctrinal and policy connections between patents and traditional, tangible property rights. As Daniel Webster declared in the House of Representatives in 1824:

And, at this time of day, and before this Assembly, . . . he need not argue that the right of the inventor is a high property; it is the fruit of his mind—it belongs to him more than any other property—he does not inherit it—he takes it by no man’s gift—it peculiarly belongs to him, and he ought to be protected in the enjoyment of it.²⁷

Accordingly, a federal court’s declaration in the late 1870s that the “property in a patented invention stands the same as other property” was hardly a novel or controversial claim.²⁸ As early as 1846, juries were instructed in patent infringement trials that “[a]n inventor holds a property in his invention by as good a title as the farmer holds his farm and flock.”²⁹ Another

²⁶ See Khan, *supra* note 25, at 28-65. Professor Khan writes: “The tendency to democratization was manifest in unique features of the U.S. patent system, such as examination of patent applications by technically qualified Patent Office employees, *the award of property rights only to the first and true inventors*, low fees, and few restrictions on the ability of patentees to exploit their inventions in the marketplace.” *Id.* at 182 (emphasis added).

²⁷ 41 ANNALS OF CONG. 934 (1824). Webster’s primary interlocutor in this House debate was Representative Buchanan, who agreed with Webster that the law should “protect the just rights of patentees” by securing “the property which an inventor has in that which is the product of his own genius.” *Id.* at 936.

²⁸ *Campbell v. James*, 4 F. Cas. 1168, 1172 (C.C.S.D.N.Y. 1879) (No. 2,361) (citing earlier Supreme Court cases supporting this claim). See also Mossoff, *supra* note 9, at 993 (identifying numerous court opinions in which patents are identified as “property”).

²⁹ *Hovey v. Henry*, 12 F. Cas. 603, 604 (C.C.D. Mass. 1846) (No. 6,742). A year earlier, Justice Woodbury would embrace this same justification for classifying patents as property:

“[A] liberal construction is to be given to a patent, and inventors sustained, if practicable, . . . [as] only in this way can we protect intellectual property, the labors of the mind, productions and interests as much a man’s own, and as much the fruit of his honest industry, as the wheat he cultivates, or the flocks he rears.”

Davoll v. Brown, 7 F. Cas. 197, 199 (C.C.D. Mass. 1845) (No. 3,662). This was the first time an American court used the phrase “intellectual property” in a patent law decision.

nineteenth-century judge instructed a jury that a “patent right, gentlemen, is a right given to a man by law where he has a valid patent, and, as a legal right, is just as sacred as any right of property.”³⁰ As another court explained, a patent secured for an inventor the right to “enjoy the fruits of his invention” because “it is his property.”³¹ These and other omnipresent statements by judges throughout the nineteenth century that patents are property rights—securing the fruits of a first inventor’s labors—reveal that the similar statements in *McKeever* and in Chancellor Kent’s *Commentaries* were anything but unusual.

Beyond these broad declarations that patents are property rights, early American courts consistently treated patents as property in substantive, legally precise ways. They identified a patent as a “title” that was possessed and owned by a first inventor,³² and they even identified multiple owners of a patent as “tenants in common” (a legal term of art from traditional, common law property rights in land).³³ Since only first inventors received patents under American law—they obtained their property rights through the intellectual and creative equivalent of first possession of land—Justice Story and other judges easily embraced property rhetoric and often accused infringers of committing *piracy*.³⁴

The analogy between the intellectual labor of the first inventor and the physical labor of a first possessor of land was in fact explicitly drawn by American judges in innumerable patent cases in the early nineteenth century. In so doing, these judges adopted in patent law the

³⁰ *Hayden v. Suffolk Mfg. Co.*, 11 F. Cas. 900, 901 (C.C.D. Mass. 1862) (No. 6,261).

³¹ *Hawes v. Gage*, 11 F. Cas. 867, 867 (C.C.N.D.N.Y. 1871) (No. 6,237).

³² See Mossoff, *supra* note 9, at 194 (identifying numerous nineteenth-century court opinions referring to patents as “title”).

³³ See *id.* at 995.

³⁴ See, e.g., *Buck v. Cobb*, 4 F. Cas. 546, 547 (C.C.N.D.N.Y. 1847) (No. 2,079) (recognizing patent law policy in construing “patent rights” with a “favoring eye” as an effort to “secure to inventors the rewards of their genius against the incursions of pirates”); *Earle v. Sawyer*, 8 F. Cas. 254, 547 (C.C.D. Mass. 1825) (No. 4,247) (Story, Circuit Justice) (instructing the jury that “piracy by making and using the [patented] machine” justifies an injunction); *Moody v. Fiske*, 17 F. Cas. 655, 656–57 (C.C.D. Mass. 1820) (No. 9,745) (Story, Circuit Justice) (referring repeatedly to infringers of both patents and copyrights as “pirates”). See also Mossoff, *supra* note 9, 993 (identifying additional court opinions in which judges called infringers “pirates”).

longstanding distinction in real property between inchoate versus choate rights. Under the common law, first possession provides a landowner with an *inchoate right* that is *perfected* by securing a legal title,³⁵ and American courts declared the same was true for first inventors. In one early patent dispute, for instance, Chief Justice John Marshall, riding circuit, referred to a pre-patented invention as an “inchoate and indefeasible property.”³⁶ This “inchoate property which [is] vested by the discovery,”³⁷ Chief Justice Marshall explained, is “perfected by the patent.”³⁸ It was the “constitution and law, taken together, [that gave] to the inventor, from the moment of invention, an inchoate property therein, which is completed by suing out a patent.”³⁹

Chief Justice Marshall thus agreed with Justice Story, Daniel Webster, Chancellor Kent, St. George Tucker and many other American judges, congressmen and commentators in the Founding and Antebellum Eras that first inventors had a right to obtain a patent given their pre-existing (inchoate) right to property established in the act of invention. This was the unique American approach to defining property rights in inventions—patents granted to first inventors—as provided in the Constitution, in the patent statutes, and in many court decisions. In this way, patents were secured under the law as property rights to first inventors in much the same way as property rights in land.⁴⁰

³⁵ See WILLIAM BLACKSTONE, COMMENTARIES, vol. 2, at *311–12; see also *De La Croix v. Chamberlain*, 25 U.S. (12 Wheat.) 599, 600–01 (1827) (noting that “actual possession” established an “inchoate right, but not a perfect legal estate” that could support “an action of ejectment”).

³⁶ *Evans v. Jordan*, 8 F. Cas. 872, 873 (C.C.D. Va. 1813) (No. 4,564) (Marshall, Circuit Justice).

³⁷ *Id.* at 874.

³⁸ *Id.* at 873.

³⁹ *Id.* See also Mossoff, *supra* note 9, at 996 (detailing numerous court opinions in which invention is identified as creating an “inchoate right” that is “perfected” by obtaining a patent).

⁴⁰ In the famed 1829 patent case of *Pennock v. Dialogue*, attorney John Sergeant succeeded brilliantly for his client in arguing that the act of invention created “inchoate right; that is, a right to have a title upon complying with the terms and conditions of the law. *It is like an inchoate right to land, or an inceptive right to land, well known in some of the states, and every where accompanied with the condition, that to be made available, it must be prosecuted with due diligence, to the consummation or completion of the title.*” *Pennock v. Dialogue*, 27 U.S. (2 Pet.) 1, 10 (1829) (emphasis added).

Even in the 1834 decision in *Wheaton v. Peters*, in which the Supreme Court held that the word “secure” in the Copyright and Patent Clause does not refer to a pre-existing common law property right,⁴¹ the Supreme Court was clear that patents were statutory rights justified as property rights given the rightful claim of a first inventor to the fruits of its intellectual labors. In sum, patents were civil rights that secured property rights, as justified under the labor theory of natural rights philosophy, just as natural rights philosophy justified other purely statutory rights, such as due process, jury trials, voting, etc.⁴² Despite widespread misunderstanding today about *Wheaton*, the Court made this point clearly: “That every man is entitled to the fruits of his own labour must be admitted; but he can enjoy them only, except by statutory provision, under the rules of property, which regulate society, and which define the rights of things in general.”⁴³ It is unsurprising then that, with its rule that only the first inventor received a patent, the patent laws were construed and extended by courts in a common law fashion that was substantively no different from their similar protection of property rights in land, chattels or other goods.⁴⁴

The unique American patent system’s rule that only the first inventor receive a patent, barring procedural or substantive defaults on the inventor’s part, has long been an essential part of the historical understanding of the Copyright and Patent Clause that Congress may secure to inventors their rights in their discoveries. As with the rest of the Constitution, this was an

⁴¹ *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 661 (1834) (“[T]he word *secure*, as used in the constitution . . . refers to inventors, as well as authors, and it has never been pretended, by any one, either in this country or in England, that an inventor has a perpetual right, at common law.”).

⁴² See generally Mossoff, *supra* note 9.

⁴³ *Wheaton*, 33 U.S. at 658. See also *Campbell v. James*, 4 F. Cas. 1168, 1172 (C.C.S.D.N.Y. 1879) (No. 2,361), *rev’d on other grounds*, *James v. Campbell*, 104 U.S. 356 (1881) (“[The patent] was granted by express law of congress, pursuant to the constitution, without which it could not exist. But, all property is upheld by law, either expressly or impliedly enacted or adopted, all of which is the law of the land, the same as the statutes upholding patents are.”).

⁴⁴ See generally Mossoff, *supra* note 9, at 998-1009 (applying canons from real property doctrines in patent law favoring patentees); Adam Mossoff, *Patents as Constitutional Private Property: The Historical Protection of Patents under the Takings Clause*, 87 B.U. L. REV. 689 (2007) (securing patents as property under the Constitution); Adam Mossoff, *A Simple Conveyance Rule for Complex Innovation*, 44 TULSA L. REV. 707 (2009) (detailing how patentees were accorded same rights as landowners in selling and commercializing their property).

essential part of American exceptionalism. Early American courts, congressmen, and commentators often recognized that the American approach to securing property rights to first inventors was one of many important points of differences between the American patent system and the English patent system (from which it was born).⁴⁵ Any attempt to eliminate this singular achievement of the American patent system violates both the text of the Copyright and Patent Clause and the longstanding understanding that this constitutional provision mandates that patents can be secured to only the first possessors of technology—first inventors.

III. Conclusion

The Constitution and long-established historical practice in American patent law establish that the only the first inventor can obtain a patent. In 1817, Justice Joseph Story, one of the principal architects of the American patent system,⁴⁶ announced that “No person is entitled to a patent under the act of congress unless he has invented some *new and useful art*, machine, manufacture, or composition of matter, *not known or used before*.”⁴⁷ Decades later, President Abraham Lincoln declared that the American “patent system . . . *secured to the inventor*, for a limited time, the exclusive use of his invention; and thereby added the fuel of interest to the fire of genius, in *the discovery and production of new and useful things*.”⁴⁸ A few years later, Justice Noah Swayne succinctly summarized this historical understanding of patents:

⁴⁵ See *Belding v. Turner*, 3 F. Cas. 84, 85 (C.C.D. Conn. 1871) (No. 1,243) (distinguishing the “personal privilege” granted in an English patent from the “incorporeal chattel” or “personal estate” secured under the U.S. patent laws). Similarly, an anonymous “Note” in the nineteenth-century federal case reporter (*Federal Cases*) explained that, unlike in England, where patents were “a personal privilege,” patents in the United States were “defined as an incorporeal chattel, which the patent impresses with all the characteristics of personal estate.” See 3 F. Cas. at 85 (following *Belding v. Turner*).

⁴⁶ See Frank D. Prager, *The Influence of Mr. Justice Story on American Patent Law*, 5 AM. J. LEGAL HIST. 254, 254 (1961) (noting that it is “often said that Story was one of the architects of American patent law”).

⁴⁷ *Bedford v. Hunt*, 3 F. Cas. 37, 37 (C.C.D. Mass. 1817) (No. 1,217) (emphasis added).

⁴⁸ Abraham Lincoln, *Second Lecture on Discoveries and Inventions* (Feb. 11, 1859), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 356, 363 (Roy P. Basler ed., 1953) (emphasis added).

The rights secured by a patent for an invention or discovery are as much property as anything else, real or incorporeal. The titles by which they are held, like other titles, should not be overthrown upon doubts or objections This principle should be steadily borne in mind by those to whom is intrusted [sic] the administration of civil justice.⁴⁹

The securing of patents to first inventors is what has made the American patent system unique—it is what has made the patent system an essential part of American exceptionalism. According to some commentators, it was also essential to the early success of the American patent system in fulfilling its constitutional purpose in promoting the progress of technology (and its resulting economic development).⁵⁰ The titles secured to first inventors in the American patent system should not be “overthrown upon doubts or objections,”⁵¹ whether those objections are borne of prudential concerns about administrative matters or treaty commitments with other countries. The Constitution—and the longstanding property rights of American inventors secured under innumerable patent statutes and in court decisions over the past two hundred years—deserves no less.

⁴⁹ *Blandy v. Griffith*, 3 F. Cas. 675, 679 (C.C.S.D. Ohio 1869) (No. 1,529) (Swayne, Circuit Justice).

⁵⁰ See Khan, *supra* note 25; Mossoff, *supra* note 44, at 727-34 (discussing the nature of innovation and how it has occurred within the patent system over time); Adam Mossoff, *The Rise and Fall of the First American Patent Thicket: The Sewing Machine War of the 1850s*, 53 ARIZ. L. REV. 165 (2011) (discussing the successful innovation that occurred in the nineteenth century under the first-to-invent American patent system).

⁵¹ *Blandy*, 3 F. Cas. at 679.